DEC 6

No. 10-99

In the Supreme Court of the United States

FRANCISCO JAVIER RIVERA AGREDANO, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners brought a breach-of-contract suit against the United States in the Court of Federal Claims seeking compensation for damages they incurred after the vehicle in which they were traveling, which petitioner Rivera Agredano had purchased at a forfeiture auction conducted by United States Customs and Border Protection (Customs), was stopped by Mexican authorities and found to contain hidden marijuana. The questions presented are as follows:

1. Whether the court of appeals correctly concluded that the sale agreement between petitioner Rivera Agredano and Customs did not include an implied-in-fact warranty that the vehicle would be free of contraband.

2. Whether the court of appeals erred in declining to consider petitioners' subsidiary arguments regarding emotional distress damages and petitioner Calderon Leon's purported status as an intended third-party beneficiary of the contract.

3. Whether the court of appeals abused its discretion in declining to transfer petitioners' Federal Tort Claims Act claims to the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 595 F.3d 1278. The opinion of the Court of Federal Claims (Pet. App. 9-101) is reported at 82 Fed. Cl. 416.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2010. A petition for rehearing was denied on April 16, 2010 (Pet. App. 118-119). The petition for a writ of certiorari was filed on July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 2001, petitioner Rivera Agredano purchased a used 1987 Nissan Pathfinder at an auction

of forfeited vehicles conducted by United States Customs and Border Protection (Customs). Pet. App. 2, 21-22. The vehicle had been seized by Customs and forfeited when its previous owner attempted to transport marijuana across the Mexican border into the United States. *Ibid.*

The auction's sales literature contained two express warranty disclaimers. The first disclaimer said that "[a]ll merchandise is sold on an 'AS IS, WHERE IS' basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied, or otherwise." Pet. App. 2, 23. The second disclaimer stated that Customs provided no warranties "regarding any aspect of the vehicle or its ability to operate." 593 F.3d 1278-1279 (2010).

Unbeknownst to either party, the vehicle contained a significant amount of concealed marijuana. Pet. App. 2. Approximately four months after the sale, petitioner Rivera Agredano was traveling in the vehicle in Mexico with petitioner Calderon Leon when the two men were stopped at a checkpoint by Mexican authorities, who inspected the vehicle and found the hidden marijuana. *Id.* at 2, 25. Petitioners were arrested and spent approximately one year in Mexican prison before being ordered released by a Mexican appellate court. *Id.* at 2-3, 37.

2. In November 2002, petitioners filed a civil tort action against the United States in the United States District Court for the Southern District of California. Pet. App. 3, 105. Petitioners invoked the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The district court dismissed petitioners' FTCA claims, holding that the FTCA's "foreign country" exception (28 U.S.C. 2680(k)) barred the suit because the injuries for which petitioners sought relief had occurred in Mexico.

Pet. App. 111-113; see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004).

The district court stated, however, that it would permit petitioners to amend their complaint to allege contract claims against the United States under the Tucker Act, 28 U.S.C. 1491. See Pet. App. 114. Petitioners subsequently amended their complaint to allege only contract claims, and they stipulated that their FTCA claims would be dismissed without prejudice. No. 3:02-cv-02243-B-NLS, Docket entry No. 92 (S.D. Cal. Feb. 3, 2005). The parties also stipulated that the amended complaint would be transferred to the Court of Federal Claims (CFC). *Ibid.*

3. The district court transferred petitioners' amended complaint to the CFC, and the United States moved to dismiss the suit. The CFC granted the motion to dismiss with respect to the claims brought by petitioner Calderon Leon on the ground that Calderon Leon was not an intended third-party beneficiary of the contract between petitioner Rivera Agredano and the United States. 70 Fed. Cl. 564, 579 (2006). The court concluded, however, that petitioner Rivera Agredano had adequately stated a claim against the United States for breach of contract. Pet. App. 38-39.

After a trial, the CFC held that Customs had breached an implied-in-fact warranty that the vehicle it sold to petitioner Rivera Agredano did not contain contraband. See Pet. App. 9-101. The court stated that an implied warranty arose from "a meeting of minds" between the parties, with Customs communicating a "tacit understanding" that it had complied with its regulatory procedures requiring the removal of contraband from vehicles prior to sale, and petitioner reasonably assuming that the United States would not sell a vehicle con-

taining illegal contraband. *Id.* at 71-72. The court awarded $550,854 in damages to petitioner Rivera Agredano. *Id.* at 101. The damages award did not include petitioner Rivera Agredano's requested compensation for emotional distress, which the court concluded was not warranted based on the evidence. *Id.* at 100-101.

4. The court of appeals reversed. Pet. App. 1-8. Citing established Federal Circuit precedent, the court held that an implied-in-fact warranty could not be based solely upon the expectation that Customs had fulfilled a regulatory duty. *Id.* at 4-5 (citing *D & N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (2003)). The court also stated that petitioners' claim of an implied warranty was "further undermined" by Customs' express disclaimers, including a statement in the sale literature that Customs made no warranties "regarding any aspect of the vehicle *or* its ability to operate." *Id.* at 5. The court of appeals stated that it was "incongruous to find that Customs impliedly warranted what it expressly disclaimed." *Id.* at 6.

Judge Dyk concurred. Pet. App. 6-7. He concluded that "[a]bsent a contractual warranty disclaimer," the sale of an automobile by the government to a private purchaser "likely carries with it an implied-in-fact warranty of fitness, including a warranty that the vehicle does not contain illegal drugs." *Id.* at 7. Because the contract here "explicitly disclaimed all warranties," however, Judge Dyk agreed that the vehicle was not covered by any implied-in-fact warranty. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 9, 12, 14-17) that the sale agreement between petitioner Rivera Agredano and the United States included an implied-in-fact warranty that

the vehicle did not contain contraband. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners further contend (Pet. 20-27) that the court of appeals erred by failing to address subsidiary issues related to petitioner Rivera Agredano's emotional distress damages and petitioner Calderon Leon's third-party beneficiary status, and by failing to transfer their FTCA claims to the Ninth Circuit. The court of appeals properly declined to address those issues. Further review is not warranted.

1. Petitioners argue that the court of appeals applied an improper standard of review to evaluate the CFC's decision that the sales contract between petitioner Rivera Agredano and the United States contained an implied-in-fact warranty that the vehicle was free of contraband. Petitioners further contend that the court of appeals' ruling conflicts with this Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). Petitioners' arguments are premised on a misunderstanding of the court of appeals' decision.

a. The court of appeals did not adopt a new standard for reviewing a trial court's factual findings. In fact, the court stated that it would "review the [CFC's] decision * * * for clear error on findings of fact." Pet. App. 4. But the question whether the vehicle sales contract contained an implied-in-fact warranty is a mixed question of fact and law, which is subject to *de novo* review. See *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999).

In holding that the contract did not include an implied-in-fact warranty, the court of appeals stated that "it is incongruous to find that Customs impliedly

warranted what it expressly disclaimed." Pet. App. 6. Far from creating any new standard, the court of appeals simply applied the contract-law axiom that obligations created under implied contract terms cannot be inconsistent with obligations created by express contract terms. See, *e.g.*, *Centex Corp.* v. *United States*, 395 F.3d 1283, 1304-1306 (Fed. Cir. 2005). Indeed, the Federal Circuit's decision in *Precision Pine & Timber, Inc.* v. *United States*, 596 F.3d 817 (2010), petition for cert. pending, No. 10-341 (filed Sept. 8, 2010), cited the decision in this case in support of the proposition that implied contractual duties "cannot * * * create duties inconsistent with the contract's provisions." *Id.* at 831.

Even without these express disclaimers, petitioners have identified no conflict among the circuits with respect to the court of appeals' holding that as a matter of law, "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." *D & N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (Fed. Cir. 2003); see Pet. App. 5-6. To establish that the government assumed a contractual obligation to perform its regulatory duties properly, the plaintiff must demonstrate "an objective manifestation of voluntary, mutual assent" to that effect. *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Petitioners presented no evidence of such an understanding here. To the contrary, the CFC acknowledged that its implied-warranty holding was based solely on the fact that federal law requires Customs to search seized vehicles for contraband before offering them for sale. Pet. App. 63-67. Without disturbing any of the predicate facts found by the trial court, the court of appeals held that this regulatory duty was insufficient to support the existence of an implied-in-fact warranty. *Id.*

at 5 ("[T]he source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function and failure to adequately perform this responsibility does not provide a contractual remedy."). That holding is supported by well-established legal principles, and it raises no issue warranting this Court's review.

b. Petitioners also contend (Pet. 12) that the court of appeals' holding conflicts with this Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). That decision is inapposite. In *Ryan Stevedoring*, the plaintiff shipowner hired the defendant to perform stevedoring services for the shipowner's cargo operations. *Id.* at 133. The Court held that a contractual agreement to perform stevedoring services "necessarily includes [an] obligation not only to stow [cargo], but to stow [it] properly and safely." *Ibid.* The Court's decision was based on a structural aspect of maritime law known as the "absolute duty of seaworthiness," which "requires shipowners, regardless of fault, to pay for accidents caused by stevedores," thereby leaving shipowners without recourse against negligent stevedores. *Fairmont Shipping Corp.* v. *Chevron Int'l Oil Co.*, 511 F.2d 1252, 1258 (2d Cir. 1975), cert. denied, 423 U.S. 838 (1975). This case, by contrast, does not involve the application of maritime law; petitioner Rivera Agredano did not contract for Customs to provide him with any service; and Customs expressly disclaimed all warranties in the auction sales literature. Pet. App. 6-7.

2. Petitioners also contend (Pet. 21-27) that certiorari should be granted because the court of appeals did not address whether emotional distress damages were available to petitioner Rivera Agredano in this case, or whether petitioner Calderon Leon is an intended third-

party beneficiary to the contract. The CFC determined that petitioner had not presented sufficient evidence of emotional distress. Pet. App. 101. The CFC also held, after reviewing the relevant provisions of the Uniform Commercial Code and case law from various jurisdictions, that passengers in a vehicle are not intended third-party beneficiaries of a contract for sale of the vehicle. 70 Fed. Cl. 564, 578-579 (2006).

Petitioner identifies no conflict in the courts of appeals on these issues. In any event, the court of appeals appropriately declined to consider those subsidiary issues because the court's resolution of those questions would have no effect on the outcome of the case. Pet. App. 6. Even if Rivera Agredano had adequately proved emotional injuries resulting from his arrest and imprisonment, or Calderon Leon had established his status as an intended third-party beneficiary of the sale contract, neither petitioner could obtain any recovery in this suit without first demonstrating that the government had breached an implied contractual promise that the vehicle did not contain marijuana. As the court of appeals correctly explained, those issues were "rendered moot" by the court's holding that the vehicle sale contract did not contain an implied-in-fact warranty. *Ibid.*

3. Finally, petitioners contend (Pet. 20-21) that the court of appeals erred by failing to transfer their FTCA claims to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. 1631. The amended complaint that was transferred to the CFC contained only contract claims. See No. 3:02-cv-02243-B-NLS, Docket entry No. 92 (S.D. Cal. Feb. 3, 2005) (stipulating that amended complaint would allege "only contract claims"); see also Pet. App. 38 (stating that petitioners' amended complaint included only contract claims). For

at least two reasons, the Federal Circuit did not abuse its discretion in declining to transfer to the Federal Circuit petitioners' appeal of the dismissal of their FTCA claims.

First, there is no evident jurisdictional basis for transferring to the Ninth Circuit any portion of this appeal. Petitioners did not seek to appeal either the district court's November 2004 order granting summary judgment for the government on petitioners' FTCA claims, or the district court's February 2005 order dismissing those claims without prejudice. See Pet. App. 38. The time for appealing those orders directly has long since passed. See Fed. R. App. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."); cf. Fed. R. App. P. 4(a)(7)(A)(i) and (ii); *ABF Capital Corp.* v. *Osley*, 414 F.3d 1061, 1064 (9th Cir. 2005) (stating that when judgment is not set forth in separate document, judgment is deemed entered 150 days from entry on civil docket), cert. denied, 546 U.S. 1138 (2006). Under 28 U.S.C. 1631, a federal trial or appellate court that does not have jurisdiction over an action or appeal may transfer the action or appeal to a court that does. Petitioners' appeal in this case, however, was from the final judgment entered by the CFC. Because the Federal Circuit rather than the Ninth Circuit had jurisdiction over that appeal, see 28 U.S.C. 1291, 1295(a)(3), the transfer mechanism was unavailable here.

Second, even if Section 1631 authorized transfer, the decision to transfer an action or appeal is discretionary, and a court is not required to undertake that course if transfer would be futile. See *Christianson* v. *Colt*

Indus. Operating Corp., 486 U.S. 800, 819 (1988); *Rodriguez* v. *United States*, 862 F.2d 1558, 1560 (Fed. Cir. 1988); *Little River Lumber Co.* v. *United States*, 7 Cl. Ct. 492, 494 (1985). If petitioners' request for transfer to the Ninth Circuit is viewed as an attempt to obtain direct appellate review of the district court's order dismissing their FTCA claims, the appeal is untimely. See p. 9, *supra*. And as the district court correctly recognized, petitioners' FTCA claims are barred in any event by the statute's "foreign country" exception.[1]

In addition, even if Customs officials could be shown to have acted negligently in failing to discover the marijuana secreted within the car, their conduct did not breach any duty owed to petitioners at the time the inspection occurred. Rather, petitioners' FTCA claims necessarily depend on the premise that the government acted tortiously in later selling them a car that (unbeknownst to Customs) contained marijuana. To find on that basis that the government breached a tort-law duty owed to petitioners would effectively negate the Federal Circuit's holding that the disclaimers communicated in connection with the vehicle sale adequately protected the United States from contract liability.

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[1] Petitioners argue (Pet. 7, 11) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Cervantes* v. *United States*, 330 F.3d 1186 (2003), in which a purchaser who was arrested and imprisoned after hidden marijuana was found in a seized vehicle that he purchased from the United States was allowed to recover under the FTCA. As petitioners acknowledge, the plaintiff in that case was arrested in California, and the FTCA's "foreign country" exception therefore was not at issue. *Id.* at 1187-1188. In any event, petitioners' FTCA claims are not before this Court, so any conflict with *Cervantes* does not provide a basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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